based discrimination against new providers [where] the incumbent telephone company pays nothing, only because they hold a century-old charter....."[44]

Of course, the Barton-Stupak opponents' arguments failed. Unless the Commission is entitled to override the will of Congress, industry's arguments must suffer the same fate here.

c. Cable operator pleas for a free ride on PROW when they provide telecommunications services are fatally flawed.

Cable industry commenters claim that, when a cable operator provides telecommunications services over the same facilities used to provide cable services, it should be immune from municipal PROW compensation and management authority otherwise preserved by §253(c).[45] These claims, however, are legally and factually flawed. In fact, if cable industry's theory were accepted, it would result in the very kind of discriminatorily favorable treatment of cable operator CLECs over non-cable operator CLECs to which CLECs generally object in their comments.

The Conference Report to the 1996 Act addressed this very issue in its explanation of what is now 47 U.S.C. §541(b)(3), governing cable operator provision of telecommunications services under Title VI. The Conferees made quite explicit their view that cable operators wishing to provide telecommunications services are in no way immune from any non-Title VI local PROW compensation or management requirements concerning telecommunication service providers. "The conferees intend that, to the

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[44] *Id.* (remarks of Rep. Fields).

[45] AT&T Comments at 16-17; Cox Comments at 27-34; MediaOne Comments at 10; NCTA Comments at 4-5 & 11-13.

extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a non-discriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees."[46]

In other words, when cable operators provide telecommunications services, they are subject to the same local PROW compensation and management authority as other non-cable telecommunications providers under §253.

Cable industry's efforts to circumvent this clear message are illusory. Cable commenters claim, for instance, that they place no additional burden on PROW when they use their cable systems to provide telecommunications service. But Cox proves that assertion wrong, as it describes the additional (and large) power supply cabinets it needs to place in the PROW, which it claims are "particularly important" for the new telecommunications services it provides. Cox Comments at 8.

Cable operators likewise claim that the 5% cable franchise fee they already pay constitutes PROW compensation. But when examined more carefully, this argument actually undermines the cable operator's position. As an initial matter, cable operators' admission that the 5% cable franchise fee is PROW compensation undermines their companion claims that PROW "compensation" is limited to "costs" and that gross revenue-based fees are not "fair and reasonable." But more relevant here is the fact that under Title VI, a cable "franchise" is only an authorization to operate a *cable* system, and the revenue base of the cable franchise fee is limited to revenues derived from operating a

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[46] H.R. Conf. Rep. No. 456, 104th Cong., 2d Sess. 180 (1996).

cable system to provide *cable* services. 47 U.S.C. §§522(9) & 542(b). By definition, a cable "franchise" does not provide authorization to use the PROW to operate a telecommunications system for the rather obvious reason that "cable service" is not a "telecommunications service". *See* 47 U.S.C. §§153(43) & (46). In short, by claiming that they may piggyback on their cable franchises to use the PROW to provide telecommunication services, cable operators are seeking a "free ride" for their telecommunications services offerings.

This "free ride," in turn, will result in precisely the sort of discrimination among telecommunication providers about which industry commenters generally complain. If the only PROW compensation a cable operator owes for use of PROW to provide telecommunications services is a 5% fee on *cable* services, which of course would be paid for entirely by its *cable* operations, while non-cable CLECs and ILECs have to pay for their PROW use from their telecommunications operations, then cable operators would be able to cross-subsidize their provision of telecommunications services on the backs of their cable subscribers. Sanctioning such blatant cross-subsidization hardly serves the Commission's pro-competitive goals, or these of the 1996 Act.

d. Industry improperly invites the commission to intrude into matters that are clearly local prow management.

Although industry commenters profess to respect the rights of municipalities to manage their PROW, and claim to seek to limit only those local requirements unrelated to PROW management, they apparently do not mean it. Instead, industry commenters complain to the Commission about local requirements that, under *any* reasonable

definition of the concept, fall squarely within historically accepted PROW management matters protected by §253(c).

AT&T (at 19), for instance, apparently wants the Commission to get into the business of second-guessing municipal decisions about when and where a telecommunications PROW user (but not other non-telecommunications PROW users, of course) may be required to relocate its PROW facilities, about whether cable can be safely overlashed onto existing cable, and about whether and how much of a cure period a telecommunications provider must be given if it defaults on its PROW obligations. Cox (at 7-10) objects to municipal limitations placed on the size and appearance of power supply cabinets and pedestals, even though Cox concedes it wishes to place those cabinets and pedestals in the PROW. Similarly, GCI (at 4-5) objects to a Snohomish County requirement that its cables be placed at the center of the roadway, apparently believing it appropriate for the Commission to decide precisely where in the PROW telecommunication facilities may be installed in every community across the nation.

Before reading these comments, NLC would have believed that even industry would concede that clear PROW management issues such as these were left to localities under §253(c). Apparently, however, industry sees no limitation on FCC jurisdiction at all in §253. It instead sees §253 as a license for the Commission to become a national PROW management regulatory authority. The Commission should roundly reject such nonsense.

2. Industry's Specific PROW Preemption Rule Proposals are Contrary to the Act and Unconstitutional.

Undaunted by the plain language of §253 and its legislative history, some industry commenters boldly urge the Commission to adopt comprehensive rules to preempt and regulate municipal authority in PROW matters.

The most common proposal is that the Commission set up a federally-imposed deadline within which municipalities must act on any PROW access request.[47] The most common deadline proposed is 30 to 45 days.[48]

The "deadline" proposal is contrary to the 1996 Act and, in any event, would violate the federalism principles of the Constitution. It is difficult to see how a Congress that explicitly wanted to keep the Commission out of PROW management matters nevertheless somehow intended to give the Commission authority to place the heavy hand of a mandatory, nationwide federal deadline on PROW management decisions. And even if such a Congressional intent could be found (it cannot), such tight federally imposed deadlines would share the same constitutional defects as the time deadlines for acting on local zoning requests concerning broadcast towers proposed in MM Docket No. 97-182 two years ago. As NLC pointed out there, such a mandatory federal deadline would force state and local governments "to absorb the financial burden of implementing a federal regulatory program" by compelling them to devote additional staff and funds to rushing thorough telecommunications providers' PROW access requests in the (likely

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[47] *See, e.g.,* ALTS Comments; AirTouch Comments; RCN Comments; Cox Comments.

[48] ALTS Comments; RCN Comments. AirTouch is a bit more generous, suggesting 90 days.

vain) attempt to meet the federally imposed deadline.[49] But the Tenth Amendment prohibits both Congress and the Commission from commandeering the resources of state and local governments, including local PROW, to serve such a federal program.[50] And by overriding local public notice and hearing requirements, the "deadline" proposal also suffers from the same troubling First Amendment and Due Process problems as the broadcast tower zoning preemption deadlines proposed in MM Docket No. 97-182.[51]

AT&T and MCI propose even more aggressive local PROW preemption rules. AT&T proposes (at 3 & 30) that in any municipality, CLECs be allowed to "opt in" on the same PROW terms and conditions as the ILEC. MCI proposes (at 6) that CLECs be allowed to renege on their existing PROW agreements with a "fresh look." MCI also suggests (at 6) that on petition to the Commission by a carrier, the Commission grant "immediate preemption" of all local PROW requirements while the carrier negotiates with the municipality on PROW terms and conditions. (One wonders, of course, why the carrier would even bother to negotiate seriously once the Commission gives it preemptive local PROW access.)

Like the "deadline" proposals, each of these proposals suffers from fatal statutory and constitutional defects. The "opt in" and "fresh look" proposals are intended to allow CLECs to get the same century-old deal as the ILEC. As we have seen, however,

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[49] Reply Comments of NLC and NATOA, *Preemption of State and Local Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities,* MM Docket No. 97-182 (*"Broadcast Tower Preemption"*) at 9-10 (filed Dec. 1, 1997) (quoting *Printz v. United States,* 117 S. Ct. 2365, 2382 (1997)).

[50] *Printz*, 117 S. Ct. at 2374. *See also* Comments of NLC and NATOA, *Broadcast Tower Preemption* at 5-8 (filed Oct. 30, 1997).

[51] *See id.* at 8-10.

Congress explicitly considered and rejected such a mandate in adopting the Barton-Stupak amendment. The "automatic preemption" proposal goes even further, apparently allowing CLECs access to PROW free of *any* terms and conditions at all. How a Congress that explicitly wanted to keep Congress out of such PROW matters managed to give the Commission sweeping PROW regulatory authority to preempt virtually all local PROW requirements, AT&T and MCI do not, and cannot, even attempt to explain.

Each of these proposals also raises serious Takings Clause and Tenth Amendment problems because each, in one form or another, would effectively allow the Commission to grant CLECs preemptive access to property (the PROW) that neither the federal government nor the CLECs own. At the overzealous requests of industry, the Commission has twice ventured down the road of attempting to grant preemptive access to the property of others (once in the case of access to ILEC property and once in the directly analogous context of OVS access to local PROW), and both times the courts have blocked its path.[52] The Commission would do well not to venture down that road again.

Although not directly characterized as such, a final proposal PROW preemption rule is RCN's suggestion (at 9) that the Commission develop and apply TELRIC or some other type of cost allocation rules to limit PROW compensation to incremental costs. At least RCN deserves credit for candor: It admits what others, such as GTE (at 3 n. 4), try to hide from the Commission: industry's incessant pleas that the Commission rule that

52 [52] *Bell Atlantic v. FCC, supra,; City of Dallas v FCC,* 165 F.3d 341, 347-349 (5th Cir. 1999).

"fair and reasonable compensation" is limited to "incremental costs" would, if accepted by the Commission, necessarily transform the Commission into a national PROW compensation rate-making body. The reason is obvious: If the Commission were to adopt such an "incremental cost" rule or policy, only the Commission would have jurisdiction to determine whether a particular PROW compensation requirement complied with that "incremental cost" rule or policy.

But the Commission has no authority to adopt any such rule or policy. While §253 may be susceptible to differing interpretations, one interpretation that is not even remotely plausible is one where, although Congress explicitly *denied* the Commission jurisdiction over §253(c) PROW compensation disputes, the Commission nevertheless has authority to become a comprehensive national rule-making and rate-making body for PROW compensation. Nowhere in the 1996 Act (or for that matter, the entire Communications Act) can one find a grant of authority empowering the Commission to regulate rates charged by municipalities for access to public property, much less require municipalities across the nation to reorder their municipal budgets and accounting systems to comply with Commission-imposed TELRIC cost accounting requirements. And for good reason: The Commission has no expertise whatsoever concerning PROW acquisition, maintenance, management, administrative and repair costs, and the Tenth Amendment prohibits such federal intrusions into the core of state and local government budgets and functions.

C. Industry's Alleged Justifications for the Need for Commission Action Are Unpersuasive.

Industry commenters proffer several supposed justifications for the Commission to intrude upon local PROW compensation and management matters. Essentially, these justifications fall in two broad categories. First, there are complaints about the fact that local PROW requirements vary, as do court decisions. In industry's ideal world, it would rather not have to deal with such variations. Second, industry offers a series of one-sided anecdotes where, according to industry, local jurisdictions have supposedly impeded competitive entry.

At bottom, industry's arguments are both misdirected and myopic. They are misdirected in the sense that, in many respects, industry's complaints are with §253 itself and with our constitutional system of federalism, matters which the Commission is powerless to change. And industry's complaints are myopic because they seek to have the Commission focus on trees, and ignore the forest: The forest is the undeniable fact that, when viewed from an overall national perspective (the only perspective even arguably relevant here), local PROW requirements cannot possibly be having any significant adverse effect on local facilities-based competition. The rather obvious reason is that, by any measure, the telecommunications industry in general, and CLECs in particular, are enjoying spectacular and unprecedented growth and success.

1. Industry's Complaints About Having to Deal with Local Variation Miss the Mark.

Industry commenters repeatedly urge the Commission to step into PROW compensation and management matters to eliminate variation in local requirements, to

spare industry the costs of litigation, and to prevent supposedly helpless industry members from being forced to enter into local PROW requirements against their will.[53]

These claims wilt under analysis. That local PROW requirements vary should hardly be surprising: Local PROW conditions and circumstances very widely, depending on a wide range of locally specific facts. Just a small sampling of such factors would include soil and weather conditions; road construction practices; types of materials used to construct and pave highways; timing and location of local development and construction projects; type of local terrain; historical utility placement practices; local labor markets; geographic size and population of the jurisdiction; local economic conditions; scope and intensity of local street use by both utilities and vehicular traffic; aesthetics and local land use concerns; and state law and charter requirements.

These are matters which will inherently vary, unless one is prepared to scrap our entire system of federalism and have the federal government oversee and perform – and fund – all core functions historically performed by state and local governments. They also are matters over which the Commission has absolutely no expertise, and no resources to develop the necessary PROW expertise and evidence-gathering and factual dispute resolution capability required to oversee PROW compensation and management in over 30,000 localities nationwide.

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[53] *E.g.* AirTouch Comments at 8-9; ALTS Comments at 7-9; Bell South Comments at 4; AT&T Comments at 29-30; Cablevision Comments at 3 & 8-9; Cox Comments at 5; CTSI Comments at 10 & n. 18; Global Crossing at I & 9; GST Comments at 5; GTE Comments at 3; MCI Comments at 6; McLeod Comments at 2; MediaOne Comments at 8; RCN Comments at 4-8; SBC Comments at i; Sprint Comments at 4 & n.6; Teligent Comments at 2.

Industry's repeated lament about litigation costs suffers from the same defect. One wonders how centralizing PROW disputes at the Commission will reduce such costs unless industry hopes to be able to do precisely what Congress, though the Gorton amendment, specifically did *not* want industry to be able to do: drag local governments to Washington, and then short-circuit the full evidence-gathering process and procedural protections of the courts.

In fact, industry's true motives in seeking to eliminate local variation and to avoid local court litigation may be darker still. Some industry commenters assert that having the Commission, rather than the courts, resolve local PROW disputes is preferable so that industry members can maintain "cordial" relations with local governments.[54] NLC can think of only one reason behind industry's apparent belief that resolving local PROW disputes before the Commission would "stain relations" less than resolving such disputes before the courts: Industry sees the Commission as an avenue through which it can make accusations against a municipality behind its back (as many industry commenters have done here) and then rely on the municipality's ignorance of those accusations to maintain "cordial relations" with it.

As for industry's assertion that its members sometimes meekly avoid litigation and "capitulate" to local PROW requirements they do not like, industry's own exhaustive list of PROW litigation to date belies its claim.[55] The suggestion that industry is a shrinking

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[54] CTSI Comments at 10 n. 18. *Accord* BellSouth Comments at 4.

[55] *See, e.g.,* ALTS Comments at App. A.

violet when it comes to protesting, and attacking, local PROW requirements before the courts, state legislatures, the Commission and Congress, is ludicrous.

In fact, industry's "poor little me" assertions are nothing more than a "heads industry wins, tails local government loses" argument. In trying to persuade the Commission that local PROW problems are more widespread than litigation to date suggests because many CLECs meekly capitulate to supposedly unreasonable municipal demands, industry is trying to use the relative *absence* of evidence of PROW disputes to show there is a need for Commission action. This is really a clever effort by industry to hide the truth from the Commission: When viewed in terms of the over 30,000 local governments across the nation, even industry's one-sided anecdotes represent a mere molehill.

Industry's anecdotes actually support the conclusions that there is no widespread problem at all, and where problems do arise, courts are more than capable of addressing the problem. Industry's anecdotes therefore establish no need for Commission action. But as we now show, there is even stronger evidence to support that conclusion. The source of that evidence is, ironically, industry itself, although industry curiously does not mention the evidence in its comments.

2. The Rapid and Enormous Growth and Success of the CLEC Industry Belies any Claim that Local PROW Requirements are a Bottleneck to Local Competition.

The purpose of the *NOI,* of course, is to gather evidence concerning what effect, if any, PROW requirements may be having on the development of local facilities–based competition. *See NOI* at ¶1. Industry seeks to respond by stuffing their pleadings with

strings of what even one CLEC concedes are "self-interested and anecdotal complaints" about supposed municipal PROW abuses.[56]

NLC suggests that industry is studiously ignoring a much more reliable and productive source of evidence responsive to the *NOI's* inquiry: data on industry's recent performance, both collectively and individually. Inherently one-sided and scattered anecdotes about what one party to a dispute feels about a particular PROW requirement provide no reliable clue at all to the Commission about whether local PROW requirements are having any discernable effect on the growth of local facilities-based competition. In contrast, data about how the telecommunications industry in general, and CLECs in particular, are performing in terms of growth and facilities deployment would seem to be a much more reliable and productive source of evidence concerning the issue.

If the Commission were to examine such industry performance data and compare it with industry's comments here, it would find that industry often tends to speak out of both sides of its mouth. While industry claims here that is believes municipal PROW requirements are "one of the biggest bottlenecks preventing rapid growth of facilities-based competition",[57] industry's own data and reports, both on the industry as a whole and for individual telecommunications companies, tell a dramatically different story.

One conclusion is clear: If local PROW requirements are a "bottleneck", that bottleneck must be very wide indeed. In its opening comments, NLC presented a sample of the substantial and publicly available evidence documenting the growth in PROW

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[56] RCN Comments at 8.

[57] *E.g.*, ALTS Comments at 7.

facility deployment by CLECs, and the phenomenal revenue and subscriber growth enjoyed by the CMRS industry.[58] Since industry chose not to inform the Commission of this type of date in its comments, NLC will supplement its earlier evidence here.

We start with what the Chairman has already recognized:

> By every measure, the telecommunications industry is thriving. Since the passage of the Telecom Act, the communications sector of our economy has grown by over $140 billion. Stock values are up and rising. The revenues of new local service providers more than doubled in 1997, and they almost doubled again in 1998.[59]

In testimony before the Senate Commerce Committee last May, the Chairman elaborated on both CLEC and ILEC growth:

> In the local phone sector, this newly-born marketplace is growing. In the first quarter of 1999 alone, almost a million CLEC access lines were installed. Although still in its infancy, the competitive local exchange industry is now a sizable telecommunications force. There are now 20 publicly traded CLECs with a total market capitalization of $33 billion, compared to six CLECs with a market cap of $1.3 billion prior to the passage of the 1996 Telecom Act. And as CLECs have grown, the incumbents have not suffered, but have thrived. On average, RBOC and GTE share price was up 4.5 percent in 1998.[60]

The Secretary of Commerce shares the Chairman's views about the phenomenal growth experienced by all sectors of the telecommunications industry over the past few

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[58] NLC Comments at 13-17 and 21-23.

[59] Address of William E. Kennard, Chairman, FCC to Comptel 1999 Annual Meeting, (Feb. 8, 1999), <http://www.fcc.gov./speeches/kennard/spwek905.html>.

years (ironically, at the very same time that, according industry commenters here, local PROW requirements have supposedly been such an impediment to growth and competition): "[T]he telecommunications industry has grown beyond our wildest dreams ... Sales of telecommunications equipment and phone service topped $400 billion in 1998 – a near doubling since 1993 .... Today, one in four Americans has a wireless phone. That's a 60 percent increase in just the last two years."[61]

Let us now turn to the CLEC industry specifically and see if data and reports about it are consistent with CLEC commentors' dire claims about the supposedly adverse effect that local PROW requirements are having on them. In fact, the data paint an entirely different picture than the one CLECs attempt to paint in their comments here.

We start with reports by the New Paradigm Resources Group ("NPRG"), whose reports are featured and endorsed at ALTS' website. Summarizing its most recent annual "CLEC Report," NPRG states that "total service revenues for CLECs increased from $9.503 billion in 1998 to $23.649 billion in 1999 – representing an overall growth of 152% [sic]."[62] And continued "explosive" growth for CLECs is predicted: "[T]he

[60] Testimony of William E. Kennard, Chairman, FCC before the Senate Commerce Committee (May 26, 1999) <http://www.fcc.gov/speeches/kennard/statements/ stwek933.html.>

[61] Prepared Remarks by William Daley, Secretary of Commerce, to a Press Conference about the Council of Economic Advisors' Telecommunications Industry Report (Feb. 9, 1999) <http://www.ncs.gov/N5_HP/Customer_Service/Affairs/SpeechSource/ss99-006.htm>.

[62] Latest CLEC Report Sites Continuing Explosive Growth of the Competitive Local Telecom Industry (Nov. 15 1999) <http://www/nprg.com/frames/news.htm> (visited Dec. 8, 1999).

industry's growth will remain high. The *Report* predicts industry-wide growth of 215% between 1999 and 2001 led by a 315% growth in data services alone."[63]

This phenomenal growth simply continues the trend of the CLEC industry over the past few years since the 1996 Act (and again, at the very time when, according to industry, local PROW requirements were supposed to be such an impediment). Between 1997 and 1998, "the CLEC market has experienced 50% growth in the number of participants, 100% growth in revenue, a tripling of access lines, and a six-fold increase in buildings connected."[64]

Finally, it is interesting to see the contrast between, on the one hand, the gloomy PROW access conditions about which CLECs complain here, and, on the other hand, the public reports and statements made by those same CLECs about their growth in PROW facilities and revenues. For example, although Level 3 complains here about the handicaps supposedly created by local PROW requirements, those alleged handicaps apparently have not significantly impeded its growth. Describing Level 3's third quarter 1999 results, its president and CEO stated:

> We met or exceeded all of our network infrastructure milestones, and made particularly strong progress in the construction of our upgradable intercity networks. In the U.S. we completed, on average, over 260 miles a week during the quarter.[65]

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[63] *Id.*

[64] 1999 Annual CLEC Report Sees Continuing Explosive Data Growth in Competitive Local Telecom Industry (April 15, 1999) <http://www.nprg.com/news/120199CLECReport2000.doc> (visited Dec. 9, 1999).

[65] Level 3 Communications Reports Third Quarter Results (Oct. 22, 1999) <http://www.level3.com/Content/1,1233,us/news/newsreleases/19991022,00.html> (visited Dec. 8, 1999).

RCN, another commenter sharply critical of local PROW requirements, has nevertheless somehow managed to enjoy phenomenal growth in network deployment and revenues, as well as the ability to attract huge new capital investments. As the Commission is no doubt aware. Paul Allen's Vulcan Ventures is making a $1.65 billion investment in RCN.[66] It is also interesting to note that, RCN's supposed PROW access difficulties notwithstanding, it "is now deploying an average of 8.1 route miles of fiber optic network per day across all of its markets, up 14% from an average of 7.1 miles per day in the previous quarter. In the first nine months of 1999, RCN has deployed more than 1,337 route fiber miles."[67]

Likewise Cox, despite all of its supposed difficulties with placing power supply cabinets in the PROW and other problems, somehow managed to triple its number of telephone-ready homes passed in one year between September 1998 and 1999, and its telephone revenue was up 160% in the same period.[68]

We do not intend to single out these particular CLECs. The story – stupendous growth in revenues, network and route miles deployment, capital investment and

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[66] RCN Reports Eighth Consecutive Quarter of Double Digit Growth (Oct. 28, 1999) <http://www/rcn/com/investor/Press/iv-99/10-28-99/10-28-99.html> (visited Dec. 8, 1999).

[67] *Id.*

[68] Cox Communications Announces Third Quarter Financial Results for 1999 (Oct. 27, 1999) <http://www.cox.com/Press/newsreleases> (visited December 9, 1999).

customers – is much the same for other CLEC commenters, and ILEC commenters too, for that matter.[69]

Nor do we mean to criticize the tremendous growth enjoyed by the CLEC industry. To the contrary, its growth is a success story that benefits the public.

We do, however, resent CLEC and ILEC industry members' reliance on isolated, one-sided anecdotes to portray municipal PROW practices as standing in the way of local facilities-based telecommunications competition when, at the same time, those same members have evidence in their own hands making plain that local PROW requirements, when considered at a whole, are clearly *not* having such adverse affects at all.

In sum, when viewed from an overall, national perspective -- the only perspective, we submit, that is at all relevant to the Commission's inquiry here – there is simply no rational basis for suggesting that local PROW requirements are having any discernable adverse effect on the development of local telecommunications competition at all. To the contrary, the best evidence – as shown by industry's explosive growth – is that locally tailored and locally enforced PROW requirements are quite compatible with, and indeed a necessary complement to, the Commission's pro-competitive agenda.

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[69] For GCI, *see* <http://www.gci.com/about/investors.html>; for ICG *see* <http://www.icgcom.com>; for GST, *see* <http://www/gstcorp.com/investor/press_releases/gen135.html> (visited Dec. 9, 1999); for McLeod, *see* <http://www.mcleodusa.com/investorelations/98annualreport/companyprofile/companyprofile.php3> (visited Dec. 10. 1999).

II. INDUSTRY'S ASSAULT ON STATE AND LOCAL TAXES IS MISDIRECTED AND UNSOUND.

A. The Record Confirms the *NOI's* Conclusion that the Commission Has Little or No Authority over State and Local Taxes.

For the most part, industry commenters do not challenge the *NOI's* wise and accurate conclusion (at ¶84) that the Commission's "legal authority to preempt State and local tax policies is extremely limited." Indeed, a few industry commenters went out of their way to agree with the *NOI* on this point.[70]

The few industry commenters that took issue with the *NOI's* conclusion uniformly rest their arguments on misreadings of the law. AirTouch, for example, claims that the tax savings clause in §601(c)(2) simply "clarifies" that the 1996 Act did not expand the Commission's preemption authority; Airtouch then seeks to find such preexisting preemption authority in §332(c)(3), added by the Omnibus Budget Reconciliation Act of 1993.[71]

AirTouch overlooks two key points. First, as we pointed out in our opening comments, the 1993 Conference Report accompanying what is now §332(c)(3) contains its own tax saving provision.[72] Second, AirTouch's suggestion that state or local telecommunications taxes could constitute a form of CMRS rate regulation prohibited by §332(c)(3) is foreclosed by precedent. Both the Commission[73] and the D.C. Circuit[74]

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[70] *E.g.* Sprint Comments at 13.

[71] AirTouch Comments at 14.

[72] NLC Comments at 18 & n.24.

[73] *Pittencrieff Communications*, 13 FCC Rcd 1735, 1745 (¶20)(1997) *petit/ for review denied sub nom. CTIA v. FCC,* 168 F. 3d 1332 (D.C. Cir. 1999).

[74] *CTIA v. FCC,* 168 F. 3d at 1336.

have already held what should be obvious to everyone but the CMRS industry: the mere fact that a government imposed fee or tax might increase a CMRS provider's cost of doing business does not constitute "rate regulation" within the meaning of §332(c)(3).

GTE, on the other hand, asserts that excessive or discriminatory taxes are subject to preemption as a barrier to entry under §253(a).[75] Apparently GTE has never bothered to read the tax savings provision in §601(c)(2) of the 1996 Act, which squarely forecloses any such claim.[76]

Likewise, misguided is Triton PCS Holdings' claim (at 3) that the Commission must "balance" the tax savings provision of §601(c)(2) against §253. Because §253 is not among the exceptions to §601(c)(2)'s tax savings provision, Congress has already conducted the "balancing": §601(c)(2) trumps §253, and the Commission cannot balance §253 against it.

B. Industry Completely Mischaracterizes the Nature and Purpose of State and Local Tax Classifications Affecting the Telecommunications industry in an Effort to Seek Tax Favoritism.

As the Supreme Court has long recognized, state and local legislatures possess "the greatest freedom of classification" in the field of taxation.[77] BellSouth appears to concede as much, but complains that the legislative process of changing state and local tax laws is "difficult and tedious."[78]

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[75] GTE Comments at 19-20.

[76] NLC Comments at 18 & nn 22-23.

[77] *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983) (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)).

[78] BellSouth Comments at 8.

Yes, relying on democratically elected legislatures to change laws can be difficult and tedious. But in our system of federalism, it is only democratically elected state and local legislatures, not unelected federal agencies, that are empowered to make the tax policies and classifications that are inherently necessary to fund the essential functions of state and local governments. Decisions about tax classifications, and about whether to impose, eliminate, raise or lower particular taxes is inextricably linked to a governmental body's budgetary needs to furnish services to the public in its jurisdiction. Consequently, if the fiscal and taxing powers of the government are to be responsive to the public, taxing decisions must be made by democratically elected legislatures, not by distant, unelected federal agencies.

Even if industry were correct in its simplistic assertion that the telecommunications industry is more heavily taxed than some other industries (and as we show below, industry's assertion is at best highly misleading), that assertion provides no justification for any federally-mandated lowering of state and local taxes imposed on the telecommunications industry. Any federally mandated lowering of such taxes would necessarily mean that state and local governments must either reduce the services they provide to the public or increase taxes imposed on other taxpayers to offset the shortfall. The problem should be apparent: state and local tax treatment of telecommunications providers cannot meaningfully be assessed or reformed in a vacuum. If it is to be done at all, it must be done by looking at the much larger picture of a particular state or local government's entire budgetary needs and tax policies. Neither Congress nor the Commission has the ability to do that. Only state and local legislature do.

Moreover, industry's generalizations about state and local taxes imposed on telecommunications providers are grossly misleading. Industry seems simplistically to assume that all state and local taxes imposed on telecommunications service providers are the product of an outdated assumption that such services used to be provided by a monopoly. That is not true. Tax classifications are made for a variety, and often a combination, of different reasons.

As an initial matter, the vast majority of the taxes about which industry complains do not single out the telecommunications industry at all. Many, in fact, are imposed on (or property valuation assessment methods applied to) all utility companies, including elective power, gas and water companies.[79] Industry presumably believes that the telecommunications industry should receive preferential treatment over other utilities because it is no longer a monopoly. But aside from the fact that other utilities, such as electric power and gas, are likewise becoming increasingly competitive, industry ignores the fact that there are other obvious differences between telecommunications and other utilities, on the one hand, and non-utility businesses, on the other, that might justify differential tax treatment.

For example, in most states, telecommunications and other utilities typically receive special, unique benefits from state and/or local governments that other businesses do not. Telecommunications and other utilities typically enjoy eminent domain power.

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[79] Some of the few telecommunications industry-specific fees and taxes about which industry complains – notably universal services fund and e-911 fees – certainly should, as a sound tax policy matter, be imposed only on telecommunications providers and their customers. Cell phone subscribers, for instance, should pay for the costs of wireless e-911 service, since they are the beneficiaries of this service.

And they also invariably receive the right to install millions of dollars worth of their own private profit-making plant on the PROW. As industry commenters point out, in several states, telecommunications providers receive either free statewide access to the PROW (e.g., California) or access at compensation well below market rates (e.g., Michigan, Colorado and Minnesota). These are, of course, enormously valuable privileges that the other businesses do not enjoy.

Two conclusions should be apparent: First, if telecommunications providers were to continue to receive these enormously valuable benefits from state and local governments and yet pay no more in taxes than the COST study's hypothetical "general business,"[80] then telecommunications providers would enjoy a huge preferential advantage, in terms of the benefits they receive from state and local governments for the taxes they pay, over such a hypothetical "general business."[81]

Second, although telecommunications providers claim that, because they are no longer monopolies, they deserve the same tax treatment as the competitive corner drug store, none proposes to relinquish the special "monopoly" utility benefits of eminent domain and PROW access that they receive. To the contrary, industry has made sure in

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[80] *See* COST, at 4. The concept of a hypothetical "general business" for tax classification and comparison purposes is itself a curious one. If, for instance, the COST study had used the oil or gas distribution business as its hypothetical "general business," the COST study would have yielded remarkably different results in most states and localities, one likely showing that telecommunications providers enjoy preferential tax treatment.

[81] The proprietor of such a hypothetical "general business" would no doubt like the ability to condemn the property of others, or to construct his plant on public property for free or at cost instead of market rates.

virtually every state that all new CLECs enjoy the same special benefits, such as PROW access, that the ILECs have historically enjoyed.

But the preferential economic benefits given to the telecommunications providers and other utilities by state and local law are far from the only rational reason for classifying them differently for tax purposes. Imposing higher transactional taxes on telecommunications and other utility services may serve other important tax policies as well.

One relates to relative tax distribution effects. Large businesses tend to be the inordinately large consumers of telecommunications and other utility services. On the other hand, large businesses are not very large consumers of the consumer retail goods that are subject to general sales taxes. For this reason, setting higher rates on utility transaction taxes than on general sales taxes results in shifting a larger proportion of the total tax burden to large businesses and a relatively smaller sales tax burden for individual residential taxpayers. Conversely, if utility taxes were lowered to the same rate as the general sales tax, that would have the effect of lightening the total tax burden of large business consumers of utility services and increasing the sales tax burden on residential taxpayers.

Utility taxes also typically generate more predictable tax revenues than most taxes on most consumer goods. The reason is that, as essential services, demand for utility services tends to be more inelastic than demand for other goods or services subject to transaction taxes. And this trait of telecommunication services is not altered by competition: Competition may increase the elasticity of demand for an individual

telecommunications service provider's services, but there is no evidence that it increases the elasticity for telecommunications services as a whole.

These, of course, are far from the only potential justifications for state and local tax policies relating to telecommunications providers and their services and property. Nor do all states or localities subscribe to these justifications or adopt tax policies consistent with them. The point is a much more basic one: State and local tax policies are a product of several different, and sometimes conflicting, policy goals, and each local jurisdiction may balance those goals differently, depending on the preferences of its voters. Neither the Commission, nor Congress, is in a position to second-guess those local legislative judgments, unless those judgments can be shown to impede the growth and development of telecommunication services.

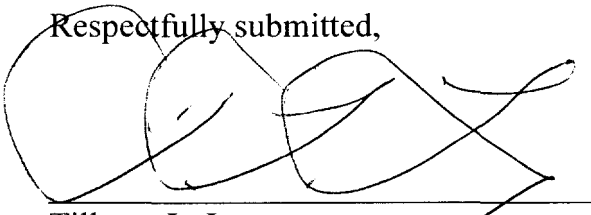
And that is clearly not the case. As we have already shown, the telecommunications industry is, and for the past several years has been, the fastest growing sector of the economy. All of this phenomenal growth has occurred even though, according to industry, it has at the very same time faced allegedly heavier tax burdens than other industries. That leads to one of two conclusions, either of which is fatal to industry's complaints about state and local taxes. Either (1) industry claims about its supposedly heavy state and local tax burdens are inaccurate; or (2) industry's supposedly heavier state and local tax burdens have not inhibited its ability to grow and expand far more rapidly than other industrial sectors that supposedly have lesser tax burdens.

Regardless of which proposition is more accurate (it may well be a mixture of both), the outcome is the same: There is no justification for federal intrusion into state or local taxes in this area.

CONCLUSION

The Commission should terminate this proceeding and send the following messages to industry: If you believe a particular local PROW requirement violates federal or state law, pursue the remedy Congress gave you: go to court. If you believe state or local tax policies should be revised, go to state and local legislatures and use the democratic process. The Commission is not designed to be, nor should it be, the telecommunications industry's own special short-cut for resolving disputes of this nautre, which go to the heart of our system of federalism.

Respectfully submitted,



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